No. 77-1387

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, PETITIONER

v.

DAVID R. MERRILL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

CITATIONS

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The Solicitor General, on behalf of the Federal Open Market Committee of the Federal Reserve System, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–18A) is reported at 565 F. 2d 778. The opinion of the district court (App. C, *infra*, pp. 21A–45A) is reported at 413 F. Supp. 494.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 19A–20A) was entered on November 10,

1977. On January 27, 1978, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 10, 1978, and on March 2, 1978, he further extended the time to and including April 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal agency may defer public disclosure of statements of final policy decisions required to be disclosed by the Freedom of Information Act, where the brief delay is necessary to permit effective implementation of the agency's policy.

STATUTE AND REGULATION INVOLVED

1. The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
>
> * * * * *
>
> (D) * * * statements of general policy * * * formulated and adopted by the agency.
>
> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> * * * * *
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; * * * unless the materials are promptly published and copies offered for sale.
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

2. 12 C.F.R. 271.5 provides:

> (a) *Deferred availability of information.* In some instances, certain types of information of the Committee are not published in the FEDERAL REGISTER or made available for public inpection or copying until after such period of time as the Committee may determine to be reasonably necessary to avoid the effects described in paragraph (b) of this section or as may otherwise be necessary to prevent impairment of the effective discharge of the Committee's statutory responsibilities.
>
> (b) *Reasons for deferment of availability.* Publication of, or access to, certain information

of the Committee may be deferred because earlier disclosure of such information would

(1) Interfere with the orderly execution of policies adopted by the Committee in the performance of its statutory functions;

(2) Permit speculators and others to gain unfair profits or to obtain unfair advantages by speculative trading in securities, foreign exchange, or otherwise;

(3) Result in unnecessary or unwarranted disturbances in the securities market;

(4) Make open market operations more costly;

(5) Interfere with the orderly execution of the objectives or policies of other Government agencies concerned with domestic or foreign economic or fiscal matters; or

(6) Interfere with, or impair the effectiveness of, financial transactions with foreign banks, bankers, or countries that may influence the flow of gold and of dollar balances to or from foreign countries.

STATEMENT

1. The Federal Open Market Committee of the Federal Reserve System ("the Committee"), which is composed of the members of the Board of Governors of the Federal Reserve System and five representatives of the Federal Reserve Banks, has the responsibility under the Federal Reserve Act for directing the operations of the System in the open market. Section 12A, as added, 48 Stat. 168, and amended, 12 U.S.C. 263. The Committee authorizes and directs Federal Re-

serve Bank purchases and sales of government securities and certain other securities in the domestic securities market. These operations are conducted through a combined investment pool, called the System Open Market Account, by the System's Account Manager in New York, under guidelines and instructions from the Committee (C.A. App. 69).[1]

The Committee employs open market operations to influence the availability and cost of bank reserves, bank credit and money. These purchases or sales of securities directly affect the level of the reserves of member banks, which in turn influences both interest rates and the ability of banks to make loans and investments. As the court of appeals observed (App. A, *infra*, p. 4A n. 4), "[w]hen the Account Manager purchases securities, the total volume of commercial bank reserves is increased. This results in increased loans and investments, and decreased interest rates, thus affecting spending and investment in the economy. When the manager sells securities, the money supply decreases and the process is reversed." The Federal Reserve System considers its open market operations to be the System's most important monetary policy instrument, not only because of their prompt and direct effect on the level of reserves, but also because open market operations, unlike other tools of monetary policy, permit the System to implement changes gradually or to probe in a given direction while main-

[1] "C.A. App." refers to the appendix filed in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

taining the ability to withdraw from that course if necessary (C.A. App. 60, 63, 67–68).[2]

The Committee meets approximately once a month to discuss policy objectives and to give policy guidance to the Account Manager for the period until the Committee's next meeting. The Committee's guidelines for the System's open market operations in the upcoming month are embodied in a Domestic Policy Directive, which is a statement of general monetary policy. The Domestic Policy Directive includes the Committee's objectives for the monetary aggregates,[3] which are stated as tolerance ranges for growth of the money supply over specified periods of time and similar tolerance ranges for the federal funds rate (C.A. App. 61–63).[4]

[2] Open market operations by the Account Manager involve enormous sums of money. In 1974, for example, the total dollar volume of outright purchases and sales of United States Government securities by the Committee was approximately $19.4 billion, and the total dollar volume of matched sale-purchase transactions and sales with repurchase agreements was approximately $135 billion (C.A. App. 115).

[3] Monetary aggregates are the various definitions of the nation's money supply used by the Committee in its operations. The principal definitions are "M_1" and "M_2". "M_1" is the currency in circulation plus demand deposits held by the public in commercial banks, and "M_2" is "M_1" plus time and savings deposits, other than large certificates of deposit, held in commercial banks (C.A. App. 118).

[4] For example, the tolerance ranges for January 1975 were 3½ to 6½ percent growth for M_1, 7 to 10 percent growth for M_2, and 6½ to 7¼ percent for the federal funds rate (C.A. App. 118). The federal funds rate is the rate at which banks are willing to lend excess reserves on an overnight basis (*id.* at 115).

The Account Manager's day-to-day operations are guided by the Domestic Policy Directive, including the tolerance ranges for the money supply and federal funds rate, and by a daily conference call with the staff and at least one member of the Committee (C.A. App. 41, 62, 115). The Manager may exercise numerous options to buy or sell any quantity of several different kinds of securities, or he may do nothing at all. The choice of method is the Manager's, but in making that choice he must consider the Committee's instructions in light of developing conditions in the market (*id.* at 115–116).

Pursuant to 12 C.F.R. 271.5, the Committee defers public availability of each month's Domestic Policy Directive until a few days after the following month's meeting.[5] Thereafter, the Directive is published in the *Federal Register,* made available for public inspection at the Federal Reserve Board's Public Information Office as part of the Committee's Minutes of Actions, and released to the press in a document called the Record of Policy Actions (C.A. App. 53).[6]

[5] Prior to March 1975, the Committee deferred release of the Directive for 90 days (App. A, *infra*, p. 5A n. 7). On March 24, 1975, the period of delay was changed to 45 days. 40 Fed. Reg. 13204. The present policy was adopted on May 24, 1976. 41 Fed. Reg. 22261.

[6] The Record of Policy Actions is subsequently published in the monthly *Federal Reserve Bulletin* and in the Board's Annual Report. In addition to the Directive, the Record of Policy Actions

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2. Respondent, a law student with "a strong interest in administrative law and the operation of agencies of the federal government" and a desire to study "the process by which the [Committee] regulates the national money supply through the frequent adoption of domestic policy directives" (C.A. App. 6), commenced this litigation in May 1975 in the United States District Court for the District of Columbia. Respondent contended that 12 C.F.R. 271.5, under which the Committee temporarily defers public release of the monthly Directive and tolerance ranges, is contrary to the "prompt" disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552(a)(2)(B) and (a)(3).

The Committee submitted a number of affidavits, including two by Federal Reserve Board member Robert C. Holland, explaining that the policy of delaying public availability of the Directive and tolerance ranges for a short time had been adopted out of concern that the immediate disclosure of this information was likely to lead to exaggerated market reactions that would seriously interfere with the orderly execution of the Committee's monetary policies, would increase substantially the annual interest payments to underwriters of government bonds, and would enable market participants engaged in the speculative trading of government securities to gain unfair profits and advantages (C.A. App. 67, 117).

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includes the votes cast by Committee members in connection with open market policy, the reasons underlying the Committee's policy actions, and any dissenting views (C.A. App. 53–54).

The district court granted summary judgment for respondent, holding that the Committee's records of its policy actions are not protected against disclosure by Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), because the records are not predecisional, but are the decisions themselves (App. C, *infra,* p. 37A). The court also held that the Committee's deferred release regulation, even if justified by reasons of monetary policy, failed to satisfy the Act's requirement of "current" and "prompt" disclosure (*id.* at 43A). Accordingly, the court ordered the Committee to cease enforcing 12 C.F.R. 271.5 insofar as it deferred public release of policy actions, to publish the Domestic Policy Directive in the *Federal Register* on adoption, and to make its other policy actions, including statements and interpretations of policy, available for public inspection without delay (*id.* at 44A).

The court of appeals affirmed, agreeing with the district court that the Committee's Directives and tolerance ranges are not predecisional, deliberative communications and that they therefore "cannot fall within Exemption 5's incorporation of the deliberative process privilege" (App. A, *infra,* p. 10A). The court of appeals acknowledged that disclosure of some final decisions might be deferred until they take effect (*id.* at 12A n. 16), but it rejected the related contention that the legislative history of the FOIA shows that Congress intended to prevent premature disclosure of even final and effective decisions where too-prompt disclosure would inhibit the effectiveness of an agency's policy (*id.* at 11A). The court reasoned that,

"even if it appeared that Exemption 5 was written with precisely the situation of the instant case in view, we must require [immediate] disclosure unless it is demonstrated that the material in dispute would not be available under the rules of civil discovery" (*id.* at 14A; footnotes omitted). Because no civil discovery privilege recognized at the time that the FOIA was passed would protect the Committee's Directives and tolerance ranges from disclosure (*id.* at 15A–18A), the court of appeals concluded that they must be released as soon as they are adopted.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals that the Federal Open Market Committee's monthly Domestic Policy Directive and tolerance ranges must be disclosed to the public immediately after their adoption threatens a serious impairment of the Federal Reserve System's open market operations, its most important monetary policy instrument to help achieve the nation's economic goals. Immediate disclosure of these instructions would affect market conditions in unintended and undesirable ways, and hence it would frustrate the Committee's attempts to control the money supply; it is likely to enable sophisticated market participants engaged in the speculative trading of government securities to gain unfair profit and advantages; and it may increase by as much as $300 million annually the cost of financing the federal government's debt. Moreover, the court's interpretation of the Freedom of Information Act apparently

would require other agencies that have reached "final" decisions on matters still subject to implementation, such as contract bids, negotiating positions, or offers to purchase or sell property, to disclose those decisions before they are carried out; disclosures such as these inevitably would inhibit effective execution of the agency's policy.[7]

These consequences are not required by the FOIA. Congress recognized that the premature disclosure of even final plans and decisions sometimes would harm governmental operations, and it therefore intended that the Committee's monthly Directive and tolerance ranges be protected from immediate disclosure by Exemption 5 of the Act. What is more, a temporary withholding of public access to agency decisions such as the Committee's monthly Directive and tolerance ranges, unlike a permanent denial of access, would undermine none of the interests that the Act was designed to advance.

1. Exemption 5 permits the nondisclosure of "inter-agency or intra-agency memorandums or letters which

[7] The Committee argued in the court of appeals that its Directive and tolerance ranges are predecisional guidelines protected from disclosure by Exemption 5 and that the *final* decision is that made by the Account Manager in buying or selling securities in the open market. Although we believe that the court of appeals' rejection of this argument is incorrect, we have not presented the issue to this Court because the question depends essentially on an analysis of the particular nature of the instructions given to the Account Manager and the role played by that official in the Committee's open market operations. Moreover, as we discuss below, the issue is not dispositive because the FOIA was intended to bar premature disclosure of some agency decisions that may be characterized as "final."

would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). This exemption was intended to protect documents that would not "routinely be disclosed to a private party through the discovery process in litigation with the agency." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Although the exemption's principal function is to avert disclosures that might affect the deliberative process by deterring uninhibited discussion in matters concerning policy-making and decision-making (S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)), that is not its only purpose. See Davis, *Administrative Law Treatise* § 3A.21, p. 157 (1970 Supp.). The Act's legislative history demonstrates that Exemption 5 also was designed to protect against the *premature* disclosure of agency plans.[8] Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 Tex. L. Rev. 1261, 1272 (1970).

In congressional hearings prior to enactment of the FOIA, a number of federal agencies expressed concern that they would be required, to their detriment, to disclose plans, negotiating positions, contract bids, and other "final" decisions before those

[8] The two purposes are not wholly distinct. Here, for example, the Committee's deliberate processes certainly would be affected by the knowledge that its formal decisions would be released prematurely. A rule requiring immediate disclosure thus might persuade the Committee to resort to "informal" understandings with the Account Manager, to adopt language in the Directive or tolerance ranges aimed at counteracting anticipated market response to the disclosure, or to employ other tactics not conducive to reasoned policy-making.

plans or instructions had been carried out.[9] See, *e.g.*, Hearings on S. 1160 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 418 (1965) (Defense Department), *id.* at 480 (General Services Administration); Hearings on H.R. 5012 before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. 224 (1965) (Post Office Department). Indeed, among the witnesses was the Acting General Counsel of the Department of the Treasury, who testified that premature disclosure of information about Federal Reserve System purchases of government securities in the market "could be very damaging to the general interest." Hearings on H.R. 5012, *supra*, at 49.

Congress responded to these concerns. The House Report on the Act states (H.R. Rep. No. 1497, *supra*, at 5–6):

> [I]n some instances the premature disclosure of agency plans that are undergoing development and are likely to be revised before they are presented, particularly plans relating to expenditures, could have adverse effects upon both public and private interests. Indeed, there may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to such interests. There may be legitimate reasons for nondis-

[9] Government agencies, for example, often issue instructions to their employees on the maximum price to pay for equipment or real estate. The ceiling is a final decision, but surely not one to be disclosed to the seller until the sale has been negotiated.

> closure, and S. 1160 [the bill that became the FOIA] is designed to permit nondisclosure in such cases.

Accordingly, with respect to Exemption 5, the Report explained (H.R. Rep. No. 1497, *supra,* at 10):

> [A] Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy.

See also S. Rep. No. 813, *supra,* at 9. This language "make[s] it clear that the Congress did not intend to require the production of [internal government] documents where premature disclosure would harm the authorized and appropriate purpose for which they are being used." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36 (1967).

2. The unanswered affidavits in this case demonstrate that the premature release of the monthly Directive and tolerance ranges is likely to impede seriously the Committee's performance of its monetary policy functions and might well lead to other deleterious results. As Governor Holland explained, "[o]ne of the most useful aspects of open market operations as a tool of monetary policy is its usefulness in implementing changes gradually or in enabling the

[Committee] to probe in a given direction while maintaining the ability to withdraw from that course if necessary" (C.A. App. 63). This moderate approach is essential to the success of the Committee's policy, because "[e]conomic and financial *stability* is a prime objective of a central bank; and gradual change is often desirable in order to minimize the risk that businessmen, consumers, and investors will overreact and cause economic conditions to worsen, either in the direction of inflation or of recession" (*id.* at 116; emphasis in original).

Immediate public disclosure of the Directive and tolerance ranges would have an "announcement effect" on financial markets, characterized by abrupt movements of securities prices and interest rates as market participants hastened to realize gains in anticipation of the Committee's purchases or sales of securities.[10] The sudden price movements would be contrary to the moderate, gradual reaction traditionally sought by the Committee; perhaps more important, price and rate movements often might be considerably larger than the Committee contemplated. Market participants on occasion might misinterpret the Directive and tolerance ranges, leading to unintended and unwelcome changes that would have to be overcome by further market activity of the Committee (C.A. App. 121).

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[10] The greatest speculative profits would accrue to those large or institutional market participants who accurately assessed the Directive and acted rapidly in buying or selling securities. Other investors, without freely available resources to buy or sell immediately, would be disadvantaged by acting after the "announcement effect" had already run its course.

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The "announcement effect" from immediate disclosure also would lead to substantial additional costs for the government's debt financing. The Department of the Treasury relies heavily on dealers in government securities to help distribute its offerings to ultimate buyers. As a consequence of the sharper fluctuations in interest rates that would likely result from immediate release of the Committee's Directive and tolerance ranges, dealer underwriting risks would be increased. The increase in risk would be accompanied by an increase in payments to compensate the risk-takers. The Treasury estimates that these additional annual expenses would exceed $300 million, given the publicly held marketable debt of $338 billion.[11]

3. In light of these consequences, the court of appeals erred in construing the Act to require public disclosure as soon as the Committee's monthly Directive and tolerance ranges are adopted. Not only was Exemption 5 drafted by Congress to authorize a brief delay in disclosure in precisely this type of situation, but also the courts possess an equitable discretion to fashion a FOIA disclosure order in the public interest.[12]

[11] This amounts to an increase of one-tenth of one percent in the rate of interest.

[12] See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329–330; *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 20–25; *Rose* v. *Department of Air Force*, 495 F. 2d 261, 269 and n. 23 (C.A. 2), affirmed, 425 U.S. 352; Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 767 (1967).

The court of appeals stated (App. A, *infra*, p. 16A n. 22) that disclosure was required, despite any equitable considerations, because Congress had rejected "the public interest standard in

Moreover, a short postponement in release of the Directive and tolerance ranges would not be inconsistent with any of the purposes underlying the Act. A temporary withholding of the materials would not contravene the "strong congressional aversion to 'secret [agency] law'" (*National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 153), because the Committee's instructions apply only to its Account Manager. The Directive and tolerance ranges are not rules that govern the adjudication of individual rights or require particular conduct or forbearance by the public (C.A. App. 114). See *Cuneo* v. *Schlesinger*, 484 F. 2d 1086, 1091 n. 13 (C.A. D.C.), certiorari denied *sub nom. Rosen* v. *Vaughn*, 415 U.S. 977.

By the same token, a delay in disclosure would pose no threat to open government and would do nothing to frustrate public scrutiny of governmental policies. See *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 17. The Directive and tolerance ranges for each month, as well as other records that explain at greater length the economic policy pursued by the Committee, are made available shortly after the succeeding month's meeting. Especially since respond-

favor of [a] broad disclosure policy * * *." This consideration may be persuasive when an agency seeks to withhold on equitable grounds a particular document from an otherwise disclosable category of documents. It may even be persuasive in assessing a contention that the public interest requires that a particular category of documents not be disclosed. But the court's unwillingness to entertain equitable arguments is quite inappropriate, we submit, when the question is not disclosure versus nondisclosure, but only disclosure now versus disclosure 30 days from now.

ent's sole purported interest in examining these documents is to study "to what extent current economic and financial factors are taken into consideration by the [Committee] in the adoption of its domestic policy directives and other policy actions" (C.A. App. 6), access to the Committee's releases for all but the most recent monthly period would fully satisfy his academic needs and would provide an ample record for him or any other person to evaluate the Committee's performance.

In sum, the court of appeals' unyielding interpretation of the FOIA, under which "even if it appeared that Exemption 5 was written with precisely the situation of the instant case in view, we must require disclosure unless it is demonstrated that the material in dispute would not be available under the rules of civil discovery" (App. A, *infra*, p. 14A; footnotes omitted), threatens to disrupt important economic policy without any corresponding public benefits. We submit that the Act's requirement of "prompt," rather than immediate, disclosure envisions that public release, even of "final" agency decisions, may be delayed for a reasonable amount of time where such delay is necessary to the successful accomplishment of the agency's policy decision.[13]

[13] In civil discovery, the model on which Exemption 5 was based, a court has discretion to defer disclosure in the interest of justice. See Fed. R. Civ. P. 26(c)(2).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1978.

APPENDIX A

In the United States Court of Appeals for the District of Columbia Circuit

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No. 76-1379

DAVID R. MERRILL, ET AL.

v.

FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, APPELLANT

Appeal from the United States District Court for the District of Columbia

(D.C. Civil 75-0736)

Argued September 28, 1976

Decided November 10, 1977

Before McGOWAN, LEVENTHAL and ROBB, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* McGOWAN

McGOWAN, *Circuit Judge:* Appellee instituted in the District Court a Freedom of Information Act (FOIA) suit in order to challenge a regulation, 12 C.F.R. § 271.5 (1975), under which appellant Federal Open Market Committee (FOMC) of the Federal Reserve System delays disclosure of certain of its records. On cross motions for summary judgment, the District Court held that the monthly instructions

given by the Committee to the Manager of its Systems Open Market Account, which guide his dealing in securities, do not fall within any exemption of the act, and therefore must be made publicly available upon adoption.

The issue on appeal is the scope of Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5) (1970).[1] That exemption affords civil discovery privileges to intra-agency memoranda, such as the documents in dispute in this case, which would otherwise be subject to disclosure under FOIA.[2] We conclude that the materials sought by ap-

[1] The District Court also held that the materials sought here do not fall within § 552(b)(2), exempting material "related solely to the internal personnel rules and practices of an agency." This finding is not challenged on appeal.

[2] The Freedom of Information Act, 5 U.S.C. 552 (Supp. IV, 1974), provides in pertinent part:

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

* * * * *

"(D) * * * statements of general policy * * * formulated and adopted by the agency.

"(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

* * * * *

"(B) those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register; * * * unless the materials are promptly published and copies offered for sale.

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

pellee are not encompassed by the government's "executive" or deliberative process privilege. Since appellant is unable to assert any other privilege which would exempt these materials from civil discovery, we hold that they are not within the purview of Exemption 5; and affirm the judgment of the District Court.

I

The Federal Open Market Committee (FOMC), composed of the Board of Governors of the Federal Reserve System and five representatives of Federal Reserve Banks, has responsibility under the Federal Reserve Act for directing Federal Reserve Bank purchases and sales of securities in the domestic securities market. 12 U.S.C. § 263 (1970). The Committee's authority to direct open-market operations is to be utilized "with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country." *Id.* § 263(c). To implement this regulatory responsibility, FOMC has established a Systems Open Market Account, which is a combined investment pool for all Reserve Banks. An Account Manager, appointed by FOMC, conducts open market operations in accordance with instructions from FOMC. These instructions are received in the form of a Domestic Policy Directive, supplemented by a statement of objectives for rates of growth of monetary aggregates (and for the federal funds interest rate) expressed in terms of tol-

(b) This section does not apply to matters that are—

* * * * *

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

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erance ranges.[3] A Directive is issued after each meeting of FOMC, which typically takes place once a month. On occasion, changing conditions require FOMC to amend its Directive or tolerance ranges before its next monthly meeting.

The Directive guides the Account Manager in his open-market operations by stating, for example, whether growth in monetary aggregates (which is achieved by open-market purchases) [4] should be moderate or rapid. In addition to the Directive and tolerance ranges, the Account Manager's operations are guided by daily communication with at least one member of FOMC. However, the Account Manager has discretion as to the method of implementing FOMC policy. He has authority to purchase or sell any quantity of a variety of securities, or he may decide to undertake no transactions at all.

Appellee, by means of a letter dated March 7, 1975, requested access under FOIA to 1) records of policy actions [5] taken by FOMC at its meeting in January

[3] "Monetary aggregates" refer to definitions of the nation's money supply. The "federal funds interest rate" is the rate at which commercial banks will lend excess reserves to one another on an overnight basis.

[4] These open-market operations are an instrument of monetary economic policy. When the Account Manager purchases securities, the total volume of commercial bank reserves is increased. This results in increased loans and investments, and decreased interest rates, thus affecting spending and investment in the economy. When the manager sells securities, the money supply decreases and the process is reversed.

[5] The "records of policy actions" requested include the Domestic Policy Directives adopted at the January 1975 and February 1975 FOMC meetings, the Minutes of Actions for each of these meetings (which include the Directive issued at the meetings), and the "Record of Policy Actions" for each of these

1975 and February 1975, including instructions to the Account Manager, and 2) Memoranda of Discussion at these meetings.[6] The FOMC Secretary replied on March 21, 1975 that records of policy action would be made publicly available 45 days after their adoption, pursuant to 12 C.F.R. § 271.5 (1976).[7] While the reply did not respond to appellee's contention that this deferred disclosure violated FOIA, it did state that FOMC considered its Memoranda of Discussion to be exempt under Exemption 5 from FOIA's disclosure requirements.

Upon appeal to the agency, Robert Holland, a member of the Board of Governors of the Federal Reserve System, released the requested records of policy actions on April 23, 1975 (45 days having elapsed since their adoption), but affirmed the Secretary's decisions that such delay in public release of the records of policy action was warranted, and that the requested

meetings. The latter document includes the Directive, and, less frequently, other policy statements (entitled Authorization for Domestic Open Market Operations, the Foreign Currency Directive, and the Authorization for Foreign Currency Operations) adopted by FOMC. In addition, the "Record of Policy Actions" explains the rationales behind the foregoing policy decisions and the votes thereon by each member of FOMC.

[6] FOMC no longer issues Memoranda of Discussion, which were detailed accounts of FOMC meetings. *Washington Post*, May 25, 1976, § D, pp. 8–9; Appellant's Brief at 12.

[7] When appellee first requested the material in dispute in this case, 12 C.F.R. § 271.5 provided that records of agency action, including Domestic Policy Directives, would not be made available until 90 days after the Directives are adopted by the Commission. The time of delay was changed to 45 days by amendment of the regulation on March 24, 1975, 40 Fed. Reg. 13204. FOMC deferral policy has changed again since this suit was instituted, *see* p. [7A] *infra*.

Memoranda of Discussion were exempt under Exemption 5. Holland's letter constituting final agency action, appellee then filed suit in the District Court, seeking declaratory and injunctive relief against the operation of 12 C.F.R. § 271.5, and an order directing FOMC to release the parts of the Memoranda of Discussion claimed by appellee to be nonexempt under FOIA.

In granting appellee's motion for summary judgment, the District Court rejected FOMC's contentions that the records of policy action (including Domestic Policy Directives) fell under the fifth FOIA exemption, and that release 45 days subsequent to adoption constituted "prompt" disclosure as required by (a)(2)(B) and (a)(3) of the Act. It therefore enjoined the operation of 12 C.F.R. § 271.5 insofar as it permitted delays in disclosure of FOMC policy actions. Holding that the Domestic Policy Directive is a statement of general policy within the meaning of 5 U.S.C. § 552(a)(1)(D), the court ordered FOMC to publish it in Federal Register upon its adoption. Memorandum Opinion at 17–19. Statements and interpretations of other FOMC policy actions were ordered to be made publicly available upon adoption as statements and interpretations of policy, pursuant to 5 U.S.C. § 552(a)(2)(B), (a)(3). *Id.* at 19–21.[8]

After the District Court entered its order, FOMC changed its deferral policy from that described in the

[8] The District Court's ruling with respect to the requested Memoranda of Discussion (now discontinued, *see* note 6 *supra*) is not at issue in this appeal. The court held that appellee was entitled to "reasonably segregable factual portions" of these documents under 5 U.S.C. § 552(b)(5). The court has not yet ruled on the memoranda which have been submitted to it for *in camera* inspection pursuant to this provision.

challenged regulation. All records of policy action are now made available "within a few days" following the FOMC meeting the month after the Directive is adopted.[9] The parties agree that this constitutes compliance with the District's Court's order only with respect to one of the requested documents, that entitled "Records of Policy Actions." This document, described in note 6 *supra*, is not completed and formally adopted until the meeting subsequent to the meeting to which it relates, and, according to Appellant's new deferral policy, is disclosed within a few days of this formal adoption.[10]

However, the District Court's order also requires *separate* and *immediate* disclosure, promptly after the meeting at which they are formulated, of statements and interpretations of FOMC policy, notably the Domestic Policy Directives and their accompanying tolerance ranges issued to the Account Manager. FOMC challenges on appeal that portion of the District Court's order directing it to disclose these documents upon their adoption. Appellant asserts that it may defer public availability of these records because they are encompassed by Exemption 5 of the Act.

II

FOIA provides for prompt mandatory disclosure of statements of policy and interpretations of policy,

[9] Brief of Appellant at 14; *Washintgon Post*, May 25, 1976, § D, p. 9. The Directive is published in the *Federal Register;* the other records are made public in a press release. *Id.*

[10] Beside statements and interpretations of policy, the "Record of Policy Actions" apparently contains material relating to the deliberative process, *see* note 5 *supra*. Appellant has chosen to make this material available after its formal adoption and has not challenged that portion of the District Court's order requiring it to do so.

unless such matters fall within one of the specific exemptions of the Act.[11] The agency carries the burden of showing that requested information falls within an exemption. 5 U.S.C. § 552(a)(4)(B).

Exemption 5 of FOIA protects from mandatory disclosure "intra-agency memorandums * * * which would not be available by law to a party other than an agency in litigation with the agency." This exemption incorporates the civil discovery law: if the document sought would be routinely available to a party in civil discovery, the fifth exemption will not protect it from prompt mandatory disclosure. *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 85–86 (1973). If a document is, however, privileged from civil discovery, it is exempted from mandatory disclosure under FOIA even if, in a particular case, a party in litigation could overcome the privilege by showing of need. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 n. 16 (1975).

This exemption incorporates the familiar "executive" privilege attaching to predecisional communications which reflect the policymakers' deliberative processes. *Id.* at 150–51. This privilege is based on the view that the quality of a decision would be adversely affected if deliberative processes were exposed to pub-

[11] *See* 5 U.S.C. § 552(a)(2): "Each agency, in accordance with published rules, shall make available for public inspection and copying— * * * (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; * * * unless the materials are promptly published and copies offered for sale." Obviously, if the materials are not "promptly published" they must be "promptly" made available for inspection and copying. The concept of "promptly available" also appear in 5 U.S.C. § 552(a)(6)(C). *See also* 5 U.S.C. § 552(a)(4)(D), giving these cases "precedence on the docket" in the District Court.

lic view: such exposure would inhibit discussions by policymakers and their advisors. *Id. See also Environmental Protection Agency* v. *Mink, supra* at 87, 89.

FOMC contends that the disputed materials (the Directives and the tolerance ranges) are predecisional records protected from disclosure by Exemption 5. It is argued that since the Account Manager has a choice in the method of implementing the policy guidelines contained in these documents, and since he consults daily with at least one FOMC member, the actual policy decision is not adopted until he acts, by buying or selling securities on the open market.

We remain unpersuaded that these documents are not FOMC's effective policy decisions until the dealing occurs. While the Account Manager retains considerable leeway in accomplishing the policy established by FOMC, he lacks authority in his position as a subordinate to disregard the Committee's policies. The Directive and tolerance ranges by practical necessity are general instructions to the Manager. That the instructions are general and thereby allow the manager some discretion in their implementation does not undermine the fact that those instructions embody the policy of FOMC.[12] A rule that these policy instruc-

[12] Nor can it be said that these documents are not "adopted" until executed because FOMC can amend them between meetings through consultations with the Manager. To the extent that deliberative communications are exchanged after the vote at the meeting and prior to a new decision which amends the previous vote, they would fall within Exemption 5. However, that a new policy can supersede a prior policy before the latter is executed does not mean that the original policy decision voted by an agency is predecisional. The decision is already reached and its disclosure "poses a negligible risk of denying to agency decisionmakers the uninhibited advice which is so important to agency decisions." NLRB v. Sears, Roebuck & Co., *supra* at 152 n. 19 (1975).

tions are not decisions until they are executed would balloon the boundaries of the privilege for deliberative memoranda far beyond its purposes. Many government policies take years to implement.

Moreover, no harm to the consultative functions of FOMC results from disclosing the policy actually adopted by it before the policy is executed.[13] FOMC's instructions to the Account Manager are the result, rather than a part, of the deliberative process. While executive privilege would protect the frank communications which occur *before* FOMC votes on the Directive and the tolerance ranges, it does not protect from disclosure the policy decision itself.[14] We agree with the District Court that the Directives and the tolerance ranges are not predecisional, deliberative communications: they rather embody FOMC's effective policy decision. Accordingly, they cannot fall within Exemption 5's incorporation of the deliberative process privilege.[15]

[13] As we have previously stated, timing alone does not determine whether a specified document is protected under the deliberative privilege: "pre-decisional materials are not exempt merely because they are pre-decisional; they must also be part of the agency give-and-take—of the deliberative process—by which the decision itself is made," *Vaughn* v. *Rosen*, 523 F. 2d 1136, 1143–44 (D.C. Cir. 1975).

[14] We note that FOMC voluntarily exposes the Directive to public view after the meeting succeeding the meeting when the Directive was first formulated and issued to the Account Manager. *See* note 7 *supra*. By this action, it implicitly acknowledges that the exposure will not be harmful to its decisionmaking process and the quality of the decision itself.

[15] FOIA requires that "statements of general policy" adopted by the agency be published in the *Federal Register*, 5 U.S.C. § 552(a)(1)(D), and that "statements of policy" not published be made available for public inspection and copying, *id.* § 522

FOMC urges that its policy instructions to the Account Manager, even if not considered predecisional and part of the deliberative process, fall within Exemption 5 because Congress intended to protect even final decisions from *premature* disclosure. Disclosure of the Directives before execution is asserted to be premature because it would allegedly affect adversely FOMC's ability to control monetary policy.

To support the assertion that the exemption was designed to protect final plans from premature disclosure, appellant quotes part of the House Report's discussion of Exemption 5, which states:

(a)(2)(B). Our conclusion that the materials in dispute in this case represent effective policy decisions not only brings them within the general disclosure requirements of FOIA, as appellants concede, *see* Memorandum Opinion at 10 n. 16, but also makes the executive privilege aspect of Exemption 5 unavailable. This conclusion does not rest on the assumption that Exemption 5 can never apply to materials otherwise subject to disclosure under § 552(a)(1)(D) or § 552(a)(2)(B). First, the executive or deliberative process, privilege is not the only civil discovery privilege incorporated by Exemption 5, *see, e.g., NLRB* v. *Sears, Roebuck & Co., supra* at 159–60 (exemption through incorporation of attorney's work product privilege in Exemption 5). Second, this privilege would be available even to policy statements where it can be shown that these meet the requirements for application of the executive privilege. Admittedly, it is difficult to conceive of a statement which is simultaneously a *policy adopted* by an agency and a *predecisional* communication made as part of the deliberative process. Even if the deliberative process privilege incorporated by Exemption 5 can never operate to exempt statements of effective agency policy, as the District Court apparently concluded, *see* Memorandum Opinion at 16 ("Directives are not exempt from FOIA but are statements of general policy within the meaning of subsection (a)(1)(d)"), and as the Supreme Court has suggested, *see* citations in note 17 *infra*, it can still operate to exempt materials otherwise subject to disclosure under the other provisions of FOIA).

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> [a] Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy.

H. Rep. No. 1497, 89th Cong., 2d Sess. p. 10 (1966).

We cannot infer from this language that Congress contemplated that final policy decision such as the one at issue here could be kept secret until executed. The policy directives are "issued" to the Account Manager upon adoption, and they become immediately effective and govern his open-market transactions. The House Report does not indicate that a statement of agency policy may be withheld subsequent to the date it becomes effective.[16]

The Senate Report on the exemption also gives no indication that the effective, working policy of an agency may be withheld. It states:

[16] Indeed, at one point the House Report implies that a document would not be protected past its effective date: "[T]here may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to [public and private] interests." H.R. No. 1497, 89th Cong. 2d Sess. (1966) p. 5. We do recognize, however, that this statement may contemplate delay in disclosure of certain final decisions before they become operative agency policy. Given our conclusion that the materials in dispute in this case are final and effective agency policy when issued, we need not reach appellant's assertion, challenged by appellee, that Exemption 5 may sometimes operate to allow delay, rather than permanent non-disclosure, of intra-agency memoranda.

> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.

S. Rep. No. 813, 89th Cong., 1st Sess. p. 9. Manifestly, Congress did not intend to expose all intra-agency communications to public view. However, this passage illuminates its concern centering on predecisional materials the exposure of which would be premature because injurious to the deliberative process. It does not indicate that a final and effective policy decision may be withheld.

Moreover, even if it could be inferred from the legislative history excerpted above that delay in disclosure of certain operative agency policies was contemplated by Exemption 5,[17] the agency claiming exemption would be required to demonstrate that the material sought "would not be available by law to a party." Congress has clearly stated that the criterion for application of the fifth exemption to the disclosure requirements of FOIA is whether the material

[17] *But see NLRB* v. *Sears, Roebuck & Co., supra* at 159–60 ("We should be reluctant * * * to construe Exemption 5 to apply to documents described in 5 U.S.C. § 552(a)(2)."); *Renegotiation Board* v. *Grumman Aircraft*, 421 U.S. 168, 186–88 (1975) (indicating that opinion within the deliberative process exemption cannot qualify as "final opinion" under § 552(a)(2)(A)).

sought would "routinely be disclosed to a private party through the discovery process in litigation with the agency." H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), p. 10. Thus, even if it appeared that Exemption 5 was written with precisely the situation of the instant case in view,[18] we must require disclosure unless it is demonstrated that the material in dispute would not be available under the rules of civil discovery.[19] Ambiguous inferences from legislative history

[18] Appellant points out that the Acting General Counsel of the Treasury Department, in his testimony on the proposed FOIA, argued that premature disclosure of "[i]nformation as to purchases by the Federal Reserve System * * * of Government Securities in the market * * * could have * * * serious effects on the orderly handling of the Government's financing requirements." Appellant's Brief at 24–25. This testimony together with the statements in the committee reports on FOIA are said to show "plainly" that Exemption 5 was intended "to protect against premature disclosure." Of course, the mere fact that both the Acting General Counsel of the Treasury and the committee reports use the word "premature" does not imply that the latter was addressing the specific concern voiced by the former. Moreover, we have already indicated, *see* note 16 *supra*, that delay in disclosure of certain policies and decisions *until they become effective* may be within the purview of Exemption 5.

[19] It is an open question whether Exemption 5 was intended to incorporate all common law privileges. We note that several of these privileges are included in other exemptions to the Act. *See, e.g.*, 5 U.S.C § 552(b)(7) (privilege for investigatory files). The Supreme Court concluded that the exemption extended to the deliberative privilege and the attorney's work product privilege only after satisfying itself that these privileges were in the Congressional contemplation. *NLRB* v. *Sears, Roebuck & Co.*, *supra* at 150, 154 (1975). We need not reach what further privileges Exemption 5 embraces in view of our conclusion that no established privilege would encompass the materials in dispute here, and that therefore Congress could not have intended their exemption.

cannot supplant the clear mandate of the language of the statute.

In addition to its assertion of executive privilege which we have rejected, FOMC urges that its policy instructions meet the criterion of Exemption 5 because they would allegedly be protected from civil discovery by a governmental privilege for "official information." "Official information" is an umbrella term which encompasses several specifically identified privileges attaching to certain defined categories of government information, including information concerning state secrets, information obtained from informers, and information contained in law enforcement investigatory files.[20] The cases relied on by FOMC as the basis for its claim of an official information privilege with respect to the instant materials fall into two categories: (1) cases recognizing a privilege for statements of witnesses given to the government upon promises of confidentiality, and (2) cases recognizing a privilege for law enforcement investigatory files. We conclude that the rationales behind these privileges are inapplicable to the documents at issue in this case. We therefore cannot accept the contention that these specific privileges, when subsumed under the banner of official information, become precedent for assertion of a privilege for FOMC's policy standards.

There does exist a governmental privilege attaching to statements given by individuals to the government

[20] Official information has also been used to connote the privilege surrounding information revealing the deliberative processes of government. *See generally* Cleary, McCormick's Handbook of the Law of Evidence, 229–242 (1972), Wright & Miller, 8 Federal Practice and Procedure § 2019 (1970).

on a promise of confidentiality, which statements are then used by the government in arriving at policy. *See, e.g., Machin* v. *Zuckert,* 316 F. 2d 336 (D.C. Cir. 1963) *cert. denied,* 375 U.S. 896 (1963).[21] This privilege is based upon the need for the government to obtain otherwise unavailable information in order to discharge properly its responsibility to make policy decisions. *See, e.g., Brockway* v. *Department of the Air Force,* 518 F. 2d 1184, 1194 (8th Cir. 1975). Efficient fact-gathering is an essential first step in the decisionmaking process. The privilege for witnesses rests on the recognition that the quality of that process as well as the decision reached is impoverished as access to relevant facts decreases.[22] This privilege cannot be extended to reach the instant situation, because neither the fact-gathering ability nor the decisionmaking proc-

[21] The *Machin* decision held that the Secretary of the Air Force was not required to disclose during pre-trial discovery an investigative report concerning an airline crash.

[22] Appellant cites language in *Machin* that disclosure of the material in that case "would hamper the efficient operation of an important Government program", 316 F. 2d at 339, as support for its contention that an "official information" privilege should be found to encompass the material in dispute in this case. We decline to transform such dictum into precedent for the existence of a broad rule that any information, disclosure of which might impede a particular government program, is "normally privileged in the civil discovery context;" *NLRB* v. *Sears, Roebuck & Co., supra* at 149.

Appellant's position ultimately rests on the claim that its information is privileged and thereby exempt because its disclosure would allegedly adversely affect the public interest. This argument runs counter to Congress' express rejection of the public interest standard in favor of the broad disclosure policy embodied in the FOIA. We cannot perceive anything in the legislative history to persuade us that Congress intended in Exemption 5 to reintroduce the rejected public interest standard.

ess of FOMC would be undercut by disclosures of these final policy decisions.

The second category of cases relied upon by FOMC identify a privilege for governmental documents such as investigatory files, disclosure of which would hamper law enforcement efforts[23] or prejudice another pending, related judicial proceeding.[24] Again, the reasons supporting the privilege in these cases would not be applicable to the policy decisions at issue here. Disclosure here would not affect government law enforcement activities or prejudice a judicial proceeding.

FOMC also seeks to bring the instructions contained in the Domestic Policy Directives and the tolerance ranges under Exemption 5 by claiming that this information would fall within the privilege accorded confidential commercial information under F.R. Civ. P. 26(c)(7). However, appellant fails to present a single case where information generated by the *government* fell within this privilege. At most, only a rough analogy could be drawn between commercial information, protected for reasons of equity in the private sector, and the instruction sought here. In view of our mandate to implement the Act's general philosophy of full agency disclosure unless information is exempt under clearly delineated statutory language," S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), we declined to create, by rough analogy, a privilege not in existence at the time FOIA was en-

[23] *See Capitol Vending Co.* v. *Baker,* 35 F.R.D. 510 (D.D.C. 1964) (documents sought from Attorney General need not be disclosed because they related to ongoing criminal investigation).

[24] *See Campbell* v. *Eastland,* 307 F. 2d 478 (5th Cir. 1962); *Rosenblatt* v. *Northwest Airlines, Inc.* 54 F.R.D. 21 (S.D.N.Y. 1971).

acted, and then incorporate this privilege into an exception to the overriding command of that Act.

III

FOIA requires that information such as the policy statements at issue in this case must be publicly released upon their adoption by the agency unless they fall within a specific FOIA exemption. For reasons stated above, Exemption 5 does not encompass the information that the District Court has ordered FOMC to make available. We note in passing that Exemption 3 allows nondisclosure of material specifically exempted by statute. Should Congress determine that release of the Directives, tolerance ranges and other FOMC documents sought in this suit will impede implementation of national monetary policy, it has the option of enacting for this material a specific statutory exemption from the operation of the Freedom of Information Act, or a specific statutory authority for deferral, amounting to an exemption from the prompt availability requirement. But the making of such exceptions is the function of the legislature, not the court.

The judgment appealed from is affirmed.

It is so ordered.

APPENDIX B

In the United States Court of Appeals for the District of Columbia

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September Term, 1977

Civil 75–0736

[Filed Nov. 10, 1977; George A. Fisher, Clerk]

No. 76–1379

DAVID R. MERRILL, ET AL

v.

FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, APPELLANT

Appeal from the United States District Court for the District of Columbia

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Before: McGOWAN, LEVENTHAL, and ROBB,
Circuit Judges

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment---------- of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
GEORGE A. FISHER,
Clerk,

Date: November 10, 1977.

Opinion for the Court filed by Circuit Judge McGowan.

APPENDIX C

In the United States District Court for the District of Columbia

Civil Action, No. 75-736

[Filed Mar. 9, 1976; James F. Davey, Clerk]

DAVID R. MERRILL, ET AL., PLAINTIFFS
v.
FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, DEFENDANT

MEMORANDUM OPINION

In this action plaintiff charges the defendant with violating the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by refusing to promptly make available certain records of the Federal Open Market Committee. The case is before the Court upon plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment.[1]

Upon consideration of the cross-motions for summary judgment, the memoranda, affidavits, and exhibits in support of and in opposition to said motions, the respective statements of fact as to which there is no genuine issue, the hearing on said motions, and the entire record herein, the Court makes the following findings of fact and conclusions of law:

[1] Initially, the complaint had two counts and two plaintiffs. The second count, the only count in which the second plaintiff was involved, was dismissed by stipulation of the parties filed on October 20, 1975.

BACKGROUND

David R. Merrill is a student at Georgetown University Law Center (Law Center) and a member of the Institute for Public Interest Representation (Institute), founded by the Law Center. Victor H. Kramer, who represents Merrill, is a professor at the Law Center and Director of the Institute.

Plaintiff claims that he has a strong interest in administrative law and the operation of Federal Government agencies; that he desires to study the current operations of defendant and the process by which defendant regulates the national money supply through adoption of domestic policy directives, and the extent to which defendant considers current economic and financial factors in the adoption of its domestic policy directives and other policy actions.

The defendant, Federal Open Market Committee (FOMC, the Committee), consists of the members of the Board of Governors of the Federal Reserve System and five representatives, either presidents or first vice-presidents, of Federal Reserve banks.[2] The function of the FOMC as set forth in 12 U.S.C. § 263 is to regulate the open-market operations of Federal Reserve banks. Subsection (b) of that statute provides that:

> No Federal Reserve bank shall engage or decline to engage in open-market operations under sections 353 to 359 of this title except in accordance with the direction of and regulations adopted by the Committee. The Committee shall consider, adopt, and transmit to the several Federal Reserve banks, regulations relating to the open-market transactions of such banks.

[2] 12 U.S.C. § 263(a).

Subsection (c) provides that:

> The time, character, and volume of all purchases and sales of paper described in sections 353–359 of this title as eligible for open-market operations shall be governed with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country."[3]

To carry out its statutory duties the FOMC has established a "Systems Open Market Account" for the obligations acquired pursuant to authorizations and directives issued by the Committee and held on behalf of all Federal Reserve banks.[4] Transactions for the Systems Open Market Account are executed by a Federal Reserve Bank selected by the Committee.[5]

The function and effect of open-market operations are described by Robert C. Holland, a member of the Board of Governors of the Federal Reserve System and thus of the defendant, in an affidavit (the allegations of which are undisputed) accompanying the defendant's motion for summary judgment:

> 4. Open market operations are important because of their prompt and direct influence upon the level of member bank reserves. When the Systems Open Market Account (SOMA)

[3] Sections 353–359 allow the Federal Reserve banks to deal in the open market in such papers as certain cable transfers, bankers' acceptances, bills of exchange, gold coin, bullion, obligations of National, State, and Municipal governments, and acceptances of Federal intermediate credit banks and of national agricultural credit corporations. Those sections also involve the setting of discount rates and the establishment of accounts, correspondents, and agencies.

[4] 12 C.F.R. § 270.2(d).

[5] 12 C.F.R. §§ 270.4(b), 270.4(d). A limited exception is made in (d) when the chosen bank is closed.

purchases securities in the open market, the payment is ordinarily deposited in the seller's bank and credited to that bank's reserve account in its regional Federal Reserve Bank. This process increases the total volume of bank reserves. Conversely, when the SOMA sells securities, the sales price typically is deducted from the buyer's bank's reserve account, thereby decreasing the volume of reserves held by member banks.

5. Changes in the volume of member bank reserves necessarily influence the ability of member banks to expand loans and investments. Member banks are required to hold a certain amount of reserves behind their deposits in accord with Board's Regulation D, 12 C.F.R. § 204. These banks typically respond to a lowering of reserve requirements or to a supplying of reserves through Open Market purchases by expanding loans and investments and/or selling their newly excess reserves to other member banks which are short of reserves or which need additional reserves in order to take advantage of particular lending and investment opportunities. As a result, deposits, loans and investments for the banking system expand to about the limit permitted by the required reserve ratio.

6. Changes in the availability of member bank reserves influence interest rates on money market instruments, including the Federal funds rate (the rate at which banks are willing to lend or borrow immediately available reserves on an overnight basis), and interest rates in the economy as a whole. Spending and investment by all sectors of the economy and all levels of industry tend to be influenced by the terms and conditions of obtaining credit.

Although the announced policy of the FOMC is to meet "at least four times each year and oftener if

deemed necessary"[6] the Committee typically meets once a month. The meeting agendas are described in 12 C.F.R. 272.3(e) as, in general, including

> "approval of minutes of action and acceptance of memoranda of discussion for previous meetings; reports by the manager and special manager on open market operations since the previous meeting, and ratification by the Committee of such operations; reports by economists on, and Committee discussion of, the economic and financial situation and outlook; Committee discussion of monetary policy and action with respect thereto; and such other matters as may be considered necessary."

PLAINTIFF'S REQUEST

On March 7, 1975 Victor Kramer, as Director of the Institute, sent a letter captioned "Freedom of Information Act Request" to the Secretary of the Board of Governors of the Federal Reserve System[7] requesting, on behalf of David Merrill, access to the following for purposes of inspection and copying:

> (1) Records of policy actions taken by the Federal Open Market Committee at its meeting[s] in January 1975 and February 1975, including, but not limited to, instructions to the Manager of the Open Market Account and any other person relating to the purchase and sale of securities and foreign currencies.
>
> (2) Memoranda of discussion at the above meetings.

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[6] 12 C.F.R. 272.3.

[7] 12 C.F.R. § 271.4(c) requires any person seeking access to the Committee's records to request them from the Secretary of the Board.

Kramer noted that an FOMC regulation stated that the Committee's economic policy directives and related information would not be available to the public for approximately 90 days after their adoption and that this appeared to the Institute to be a violation of the Freedom of Information Act.

By letter dated March 21, 1975, Arthur L. Broida, secretary to the Federal Open Market Committee, responded to the request. With respect to the records of policy action, Broida stated that the Committee had recently determined to make those records available after 45 days rather than 90 days following the relevant meeting and that those records would then be available to the general public, including Merrill. As to those records no claim was made that they were exempt under the Freedom of Information Act. (FOIA), 5 U.S.C. 552. Regarding the memoranda of discussion, Broida stated the Committee's position that those documents were exempt under exemption (b)(5) of the Freedom of Information Act. Broida further stated that although the Committee felt the memoranda to be exempt, the Committee did release the memoranda after a time delay of approximately five years. Broida listed reasons for the time delay in releasing the memoranda of discussion including: a need for candor at the meeting on the part of the participants; a need to preclude those sophisticated in market analysis and speculators from gaining unfair profits or advantages; prevention, to the extent possible, of any interference with the orderly execution of policies or objectives of other government agencies concerned with economic or fiscal matters; and a need to preclude, to the extent possible, interference with or impairment of ongoing or prospective financial transactions with foreign banks, bankers or countries.

On March 27, 1975, Kramer wrote to Broida appealing Broida's decision as being in violation of the Freedom of Information Act, inasmuch as no exemptions were claimed for the records of policy action and that under 5 U.S.C. 552(b) and *E.P.A.* v. *Mink,* 410 U.S. 73, (1973), segregable factual portions of the memoranda of discussion were nonexempt and were subject to prompt release.

By letter dated April 23, 1975, Robert C. Holland, member of the Board of Governors of the Federal Reserve System responded. Holland enclosed all of the records of policy action (45 days having elapsed since the meetings involved). He made no claim that the records of policy were exempt under the FOIA, but stated that the delay in disclosure of these records was "founded upon a legislative policy against premature disclosures which would impair the effectiveness of the operations of Government agencies." Holland stated that he affirmed Broida's decision with respect to the memoranda of discussion as being exempt under (b)(5) of the FOIA and that they contained no segregable factual materials subject to the requirements of *E.P.A.* v. *Mink,* 410 U.S. 73, 87–93 (1973). Holland further advised that his determination was final agency action and that a complaint for judicial review could be filed.

The instant complaint was filed on May 8, 1975. Plaintiff seeks a declaratory judgment that defendant has violated the Freedom of Information Act, 5 U.S.C. § 552, by deferring the public availability of its records of policy action for 45 days beyond the date of their adoption and by delaying the public release of segregable factual portions of the memoranda of discussion of its meetings for approximately five years following the relevant meetings.

THE DOCUMENTS

a. Records of Policy Action

At each meeting of the Committee a Domestic Policy Directive is adopted. The Directive is a statement of general monetary policy in the form of guidelines for the manager of the Systems Open Market Account. Less frequently the Committee also adopts amendments to its three other policy instruments: the Authorization for Domestic Open Market Operations, the Foreign Currency Directive and the Authorization for Foreign Currency Operations.

Following each meeting the Committee's Secretariat drafts a document entitled "Record of Policy Actions."[8] The "Record of Policy Actions" consists of the records of the aforementioned policy actions adopted at the meeting, the underlying rationale therefore, and the vote of each member of the Committee thereon. The Secretariat's draft is then distributed to the participants at the meeting for their comments as to rationale, revised, and submitted to the Board of Governors for inclusion in its annual report to Congress.[9]

Pursuant to 12 C.F.R. § 271.5,[10] the Committee defers the public availability of all records of its policy actions until approximately 45 days after the meeting

[8] Plaintiff has sought all records of policy action. As is shown herein, these records exist in several forms among them the "Records of Policy Actions."

[9] If, pursuant to 12 C.F.R. § 272.4, amendments are made to the Domestic Policy Directive between meetings, those amendments, together with the reasons therefore and votes thereon, are included in the "Record of Policy Actions" for the most recent meeting.

See, 12 U.S.C. § 247a for the Board's record-keeping responsibilities.

[10] As amended, March 24, 1975, 40 Fed. Reg. 13204.

at which the actions were adopted. At that time the Domestic Policy Directive is published in the Federal Register and the "Record of Policy Actions" incorporated by reference therein and otherwise released.

b. Memoranda of Discussion

The Memoranda of Discussion are minutes of the Committee's meetings. They are drafted after a meeting, circulated to the persons who attended the meeting for comments, revised, and approved at a subsequent Committee meeting.

The FOMC releases its Memoranda of Discussion to the public after a period of approximately five years following the relevant meeting. However certain portions, mostly relating to the foreign currency area, are deleted from the released Memoranda and never made publicly available.

FREEDOM OF INFORMATION ACT

The Freedom of Information Act, 5 U.S.C. § 552, provides, *inter alia,* that:

> (a) Each agency shall make available to the public information as follows:
>
> (1) Each agency shall separately state and *currently publish* in the Federal Register for the guidance of the public—
>
> * * * * *
>
> (D) [S]tatements of general policy * * *
>
> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> * * * * *
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

* * * * *

unless the materials are *promptly* published and copies offered for sale.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records *promptly* available to any person. [Emphasis added]

(b) This section does not apply to matters that are—

(2) related solely to the internal personnel rules and practices of an agency;

* * * * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

The Freedom of Information Act thus calls for either "current publication" or "prompt" disclosure of records subject to it.

Defendant's policy of and reasons for deferring the public availability of the requested documents are expressed in 12 C.F.R. § 271.5, as amended, March 24, 1975, 40 Fed. Reg. 13204, as follows:

(a) *Deferred availability of information.* In some instances certain types of information of the Committee are not published in the Federal Register or made available for public inspection or copying until after such period of time as the Committee may determine to be reasonably necessary to avoid the effects described in paragraph (b) of this section or as may otherwise be necessary to prevent impairment of the effective discharge of the Committee's statutory responsibilities. For example, the Committee's domestic policy directive adopted at each meeting of the Committee is published in the Federal Register approximately 45 days after the date of its adoption; and no information in the records of the Committee relating to the adoption of any such directive is made available for public inspection or copying before it is published in the Federal Register or is otherwise released to the public by the Committee.

(b) *Reasons for deferment of availability.* Publication of, or access to, certain information of the Committee may be deferred because earlier disclosure of such information would

(1) Interfere with the orderly execution of policies adopted by the Committee in the performance of its statutory functions;

(2) Permit speculators and others to gain unfair profits or to obtain unfair advantages by speculative trading in securities, foreign exchange, or otherwise;

(3) Result in unnecessary or unwarranted disturbances in the securities market;

(4) Make open market operations more costly;

(5) Interfere with the orderly execution of the objectives or policies of other Government agencies concerned with domestic or foreign economic or fiscal matters; or

(6) Interfere with, or impair the effectiveness of, financial transactions with foreign banks, bankers, or countries that may influence the flow of gold and of dollar balances to or from foreign countries.

The Supreme Court stated in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975):

It is sufficient to note for present purposes that the [Freedom of Information] Act seeks

> "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." * * * As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions. (citations omitted).

The burden is on the agency to establish that the requested information falls within one of the exceptions.[11] This Court finds that defendant has not succeeded in carrying its burden.

The Committee attempts to justify the deferred availability of the records of its policy actions by asserting that they are exempt from the FOIA by subsections (b)(2) (Exemption 2) and (b)(5) (Exemption 5) of the Act. The only exemption briefed for and argued at the hearing was Exemption 5. It was only in a motion to amend the Court's findings at the hearing that the FOMC, for the first time, saw fit to raise Exemption 2. The apparent theory of the Committee's position is that the documents need not be released at all and the fact that they do release them 45 days after the meeting at which they were adopted (or to which they relate in the case of the "Records of Policy Actions") is due solely to the Committee's benevolence.

Exemption (2), belatedly claimed by the Committee for its records of policy actions, provides:

> (b) this section does not apply to matters that are—
>
> (2) related solely to the internal personnel rules and practices of an agency.

[11] 5 U.S.C. § 552(a)(4)(B).

The District of Columbia Circuit Court of Appeals dealt with this subsection in *Vaughn* v. *Rosen*, 523 F. 2d 1136 (D.C. Cir. 1975). The majority of the Court found that the intent of Congress was reflected in the Senate Report as follows:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.[12]

The Court then stated:

> [W]e are of the view that the Senate Committee Report is authoritative and that Exemption 2 exempts from disclosure only routine 'house-keeping' matters in which it can be presumed the public lacks any substantial interest.[13]

Defendant's records of policy actions are clearly not "housekeeping" matters. Exemption 2 does not apply.

In his concurring opinion in *Vaughn,* Judge Leventhal stated that:

> It seems unlikely that the (b)(2) exemption is applicable only to the kind of routine or trivial agency personnel policies and practices itemized in the Senate Report. *But even so the exemption is limited to predominately "internal personnel rules and practices of an agency."*[14] (Emphasis added)

The nature of the documents together with defendant's vigorous arguments concerning the influence of the

[12] 523 F. 2d at 1140–41.

[13] *Id.*, at 1141.

[14] 523 F. 2d at 1151.

policy decisions of the FOMC upon the nation's economic status and the fact that the documents are publicly released on a deferred basis, demonstrate that even under Judge Leventhal's broader view, defendant's contention that Exemption 2 applies is without merit.

The other exemption claimed by the defendant for its records of policy actions, Exemption 5, provides:

> (b) This section does not apply to matters that are—
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

In *NLRB* v. *Sears, Roebuck & Co., supra,* the Supreme Court found it

> reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context.[15]

Defendant herein relies upon executive privilege[16] recognized by the *Sears* court as having been specifically contemplated by Congress in enacting Exemption 5.[17] Finding that the ultimate purpose of executive privilege is to prevent injury to agency decisions, the Supreme Court determined that:

> Exemption 5, properly construed, calls for "disclosure of all opinions and interpretations" which embody the agency's effective law and policy, and withholding of all papers which

[15] 421 U.S. at 149 (footnote omitted).

[16] Executive privilege is the generally recognized privilege for confidential intra-aency advisory opinions disclosure of which would be injurious to the consultative functions of government. *Id.*

[17] *Id.* at 150.

> reflect the agency's group thinking in the process of working out its policy and determining what its law shall be."[18]

In *Vaughn* v. *Rosen, supra,* our Court of Appeals expressed the thought this way:

> [T]o come within the privilege [for confidential intra-agency advisory opinions disclosure of which would be injurious to the consultative functions of government] and thus within Exemption 5, the document must be a direct part of the deliberative process in that it make recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be part of the agency give-and-take—of the deliberative process—by which the decision itself is made.[19]

Defendant's assertions that its records of policy actions are exempt under Exemption 5 rest on the specific holding of the Supreme Court as to the documents sought under the FOIA in the *Sears* case. *Sears* involved Advice and Appeals Memoranda by which, in certain instances, the General Counsel of the National Labor Relations Board (NLRB) instructs the Board's Regional Directors whether to file charges of unfair labor practices. The Supreme Court held that the Memoranda which conclude that no complaint should be filed and which have the effect of finally denying relief to the charging party are not within the scope of Exemption 5. However, those Memoranda directing the filing of a complaint and commencing litigation before the Board are exempt from disclosure under Exemption 5.

[18] 421 U.S. at 153.

[19] 523 F. 2d at 1143–44.

Defendant herein, analogizing its records of policy actions to the Advice and Appeals Memoranda which direct the filing of a complaint, argues that its records of policy actions are pre-decisional instructions to its staff and thus exempt under executive privilege.[20]

The Court finds that the FOMC has misread *Sears*. In addition to executive privilege the *Sears* court found that Congress had intended to incorporate the attorney's work product privilege into Exemption 5.[21] The Supreme Court made clear that the Advice and Appeals Memoranda directing the filing of complaints are within Exemption 5 only because they are attorney's work product.[22] Since defendant has not raised the attorney's work product privilege with respect to its records of policy actions, its reliance on this holding in *Sears* is misplaced.

The Court finds no basis for the FOMC's assertion that its records of policy actions are within the executive privilege aspect of Exemption 5. Defendant's records of policy actions are not papers which reflect the Committee's group thinking in the process of working out its policy and determining what its law shall be. Defendant's records of policy actions are not pre-decisional nor part of the agency give-and-take—

[20] Defendant's Reply Memorandum Statement, at 7, 8. Transcript of hearing at 15–20 and 22.

[21] 421 U.S. at 154.

[22] Id., at 160.

This is consistent with 5 U.S.C. § 552(a)(2)(C) which makes "instructions to staff that affect a member of the public" specifically disclosable, as the act does not apply to documents exempt under subsection (b), including Exemption 5. Whether defendant's assertions that its Domestic Policy Directives are staff instructions makes the Directives subject to subsection (a)(2)(C) is a question not raised by plaintiff and which the Court finds unnecessary to reach.

of the deliberative process—by which the decisions themselves are made. Defendant's records of policy actions *are the decisions themselves,* and, in the case of the "Records of Policy Actions", also the rationale therefor.[23] Defendant's records of policy actions *are* the embodiment of the FOMC's effective law and policy. Moreover, the point of executive privilege

> is that the 'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public; and the 'decisions' and 'policies formulated' would be the poorer as a result.[24]

Assuming *arguendo* that defendant's records of policy actions contain pre-decisional, deliberative material, the regular voluntary public release of the records by the FOMC approximately 45 days after each meeting indicates that there would be no point in applying executive privilege to these documents. Defendant has not sustained its burden of proving that its records of policy actions are exempt from disclosure under Exemption 5.

The Court's findings that defendant's records of policy actions are not exempt from the FOIA by subsection (b)(2) or (b)(5) of the Act are supported, if not compelled, by defendant's own interpretations of its records of policy actions. The Press Release of March 24, 1975,[25] announcing that the Committee had

[23] "[T]he public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted." *Id.*, at 152.

[24] *Id.*, at 150.

[25] Attachment A to Defendant's Statement of Points and Authorities in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment.

shortened the delay in the release of the records contains the following:

> A delay of approximately 90 days had been in effect since mid-1967 when the rules were changed to comply with the Freedom of Information Act. Prior to 1967, the records of policy actions were published only in the Board's Annual Report to Congress.

Obviously the Committee considered its records of policy actions to be subject to and not exempt from the Freedom of Information Act or it would not have found it necessary to change its disclosure policy to comply with the Act.

Furthermore, when plaintiff sought defendant's records of policy actions under subsection (a)(3) in his complaint and then additionally under subsection (a)(2) in his motion for summary judgment, the defendant responded:

> The FOMC's Domestic Policy Directive, which is quoted verbatim in each Record of Policy Actions, should be regarded as a statement of general policy within the meaning of 5 U.S.C. § 552(a)(1)(D). This conclusion is supported by 40 years of practice of the FOMC and the Board of Governors in submitting policy records to Congress each year, by the provisions of 12 U.S.C. § 247, and more recently by the practice of publishing the Directive and referencing the Records of Policy Actions in the *Federal Register*. To be sure, such a classification places a more onerous burden on the FOMC than the classification suggested by Plaintiffs, since publication is required.[26] (Footnote omitted.)

[26] Defendant's "Statement of Points and Authorities in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment" at 16.

The Court has no difficulty in accepting the FOMC's position that the Domestic Policy Directives are not exempt from the FOIA but are statements of general policy within the meaning of subsection (a)(1)(D).

Furthermore, since the "Records of Policy Actions" are incorporated by reference in the defendant's statements in the Federal Register they are not exempt from disclosure but must be promptly disclosed when finally adopted.[27] In *Sears, supra,* the Supreme Court made this statement:

> [W]e hold that, if an agency chooses *expressly* to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would wotherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5.[28] (Emphasis in original)

By being expressly incorporated by reference in the Domestic Policy Directive, the Records of Policy Actions lose whatever exempt status that they might have had under Exemption 5. And, as noted above, the only other exemption claimed by the Committee for the "Records of Policy Actions," *i.e.,* Exemption 2, clearly does not apply.

This Court can find no basis for the claim of the FOMC that it may withhold its records of policy actions for 45 days or the "Records of Policy Actions" after their approval on the grounds that they are exempt from the FOIA and their revelation a magnanimous gesture by the agency.

[27] Plaintiff has not sought a determination that the other policy actions must themselves be published in the Federal Register and the Court finds it unnecessary to reach the question.

[28] 421 U.S. at 161.

The Court therefore finds that defendant's Domestic Policy Directives are subject to 5 U.S.C. § 552 (a)(1)(D) as statements of general policy. The Court further finds that defendant's policy actions other than the Domestic Policy Directives are subject to 5 U.S.C. § 552(a)(2)(B) as statements and interpretations of policy which have been adopted by the agency and are not published in the Federal Register. Additionally, the Court finds that those portions of the documents entitled "Records of Policy Actions" that contain other than statements and interpretations of policy are subject to the Act's catch-all provision, 5 U.S.C. § 552(a)(3).

There remains the question as to whether the release of the documents by the FOMC 45 days after the meeting as which the policy actions are adopted and to which the "Records of Policy Actions" relates, is "current" or "prompt" disclosure within the meaning of subsections (a)(1), (a)(2), and (a)(3) of the Act.

Again, accepting the FOMC's position that the Domestic Policy Directive is a statement of general policy within the meaning of Subsection (a)(1)(D), the FOMC is required to "separately state and currently publish" the Directive in the Federal Register. The Court finds that the requirements of (a)(1)(D) that statements of general policy be "currently published" in the Federal Register requires that such publication be made as soon as possible with no delay other than that occasioned by the normal process of publication in the Federal Register. By delaying the publication of the Domestic Policy Directive until 45 days after the meeting at which it was adopted and after another Domestic Policy Directive has been adopted, the FOMC *never currently publishes* its Do-

mestic Policy Directives but rather publishes one which is outdated. Obviously a delay of 45 days does not satisfy the statutory requirement to "currently publish".

Subsection (a)(2)(B) of the FOIA requires that statements and interpretations of policy not currently found in the Federal Register be made available for public inspection and copying unless "promptly published". For publication to be prompt so as to obviate the responsibility of the agency to make its records available for public inspection and copying there can be no attendant delay other than that occasioned by the normal publication process. If the "general philosophy of full agency disclosure" [29] mandated by the FOIA is to be realized, agencies may not be allowed to otherwise delay the public release of its documents.

The Freedom of Information Act contemplates public disclosure of current agency policy and not merely past policy. Defendant's practice of withholding its present policy records from the public for 45 days during the time the policy may be superseded is clearly contrary to the purposes of the Freedom of Information Act. A 45 day delay cannot be equated with "promptness."

Similarly the Court finds that those portions of the "Records of Policy Actions" subject to subsection (a)(3) must be released at the time of their approval in order to satisfy the requirement of the subsection that such records be made "promptly available."

In addition to the records of policy discussed above, plaintiff, in his complaint, sought "some or all" of the memoranda of discussion of defendant's meetings of January 20–21, 1975, and February 19, 1975. How-

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[29] *NLRB* v. *Sears, Roebuck & Co., supra*, at 136.

ever, at the hearing on the cross-motions for summary judgment, plaintiff stated that he sought only those parts of the memoranda

> that contain segregable, discreet statements of fact, rather than statements of opinion for deliberation.[30]

Although FOMC releases the entire memoranda of discussion after approximately five years, defendant claims that its entire memoranda of discussion are exempt from the FOIA by subsection (b)(5) of the Act. However, subsection (b) as amended, 1974, provides:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of those portions which are exempt under this subsection.

In *EPA* v. *Mink,* 410 U.S. 73, 91 (1973), the Supreme Court stated:

> It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies. And, as noted, *that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the document.* (Emphasis added)

Plaintiff is entitled to the reasonably segregable factual portions of the memoranda of discussion of de-

[30] Transcript of hearing, page 5.

fendant's meetings of January 20–21, 1975, and February 19, 1975.[31]

In finding that the FOMC may not delay the public disclosure of its records of policy actions nor the factual portions of its memoranda of discussion, the Court is not unmindful of the repeated insistence by the Committee that such disclosure would be injurious to its function and the nation's monetary and economic status. But the Freedom of Information Act requires prompt disclosure of non-exempt materials. FOMC has not satisfied the Court that the records sought in this proceeding are exempt from disclosure under any exemption in the Statute as enacted by Congress. If it is necessary for the FOMC to carry out its monetary policy in secrecy then that determination must be made by Congress and not this Court.

CONCLUSIONS

Upon consideration of all of the foregoing the Court concludes that none of the reasons given in 12 C.F.R. § 271.5(b) for the deferred availability of information requested by plaintiff constitutes an exemption under subsection (b) of the Freedom of Information Act. 5 U.S.C. § 552.

Specifically, defendant's records of its policy actions are not exempt under subsection (b)(2) or (b)

[31] Defendant's repeated reliance on *Montrose Chemical Corp. of California* v. *Train,* 491 F. 2d 63 (D.C. Cir. 1974) is misplaced. In that case assistants prepared a summary of record evidence for use by the administrator in reaching a decision. The Court held that: "When a summary of factual material on the public record is prepared by the staff of an agency administrator, for his use in making a complex decision, such a summary is part of the deliberative process, and is exempt from disclosure under exemption 5 of FOIA." *Id.,* at 71. Defendant FOMC does not make a public record. Rather its meetings are held in secret and the contents revealed only after five years.

(5) of the Freedom of Information Act but are subject to the disclosure requirements of subsection (a) of the Act.

Defendant's Domestic Policy Directive is a statement of general policy which must be currently published in the Federal Register in accordance with subsection (a)(1)(D) of the Act.

Defendant's other policy actions are subject to subsection (a)(2) of the Act and in accordance with that subsection must be made available for public inspection and copying unless promptly published.

The portions of defendant's "Records of Policy Actions" that are not statements or interpretations of policy are subject to subsection (a)(3) of the Act and must be promptly made available after approval in accordance with the provisions of that subsection.

Reasonably segregable factual portions of defendant's memoranda of discussion of its meetings of January 20–21, 1975, and February 19, 1975, are not exempt from the Freedom of Information Act by subsection (b)(5) of the Act but are subject to the prompt disclosure requirements of subsection (a)(3) of the Act.

Inasmuch as there is no genuine issue of material fact, an order and judgment will be entered herein granting plaintiff's motion for summary judgment and denying defendant's cross-motion.

At the conclusion of the hearing on the cross-motions for summary judgment, counsel for the defendant requested the Court to stay that portion of its order relating to the records of policy action in order that defendant might exercise its right of appeal. The Court denied the request. Upon reconsideration and in view of defendant's vigorous representations as to the serious adverse consequences to its functioning and the nation's monetary policies and economy, the Court will now grant defendant's request and stay that portion of its Order requiring immediate production of its records of policy action for 10 days to allow defendant to exercise its right of appeal. If appeal is taken the stay will remain in effect pending the disposition of the appeal.

JOSEPH C. WADDY,
United States District Judge

Date: March 9, 1976

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